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Attorneys for Intervenor Federal Housing Finance Agency

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

SKYLIGHTS LLC, Plaintiff,
vs.

DAVID BYRON; et al.,
Defendants.
and

FEDERAL HOUSING FINANCE AGENCY,
as Conservator for the Federal National
Mortgage Association,

Intervenor.

CASE NO. 2:15-cv-00043-GMN-VCF

**FANNIE MAE AND FHFA'S MOTION TO
COMBINE HEARING ON THEIR
MOTION FOR SUMMARY JUDGMENT
WITH THE CURRENTLY SCHEDULED
HEARING IN SATICOY BAY**

1 FEDERAL NATIONAL MORTGAGE
2 ASSOCIATION,

3 Counterclaimant,
and

4 FEDERAL HOUSING FINANCE AGENCY,
5 as Conservator for the Federal National
6 Mortgage Association,

7 Intervenor,

8 vs.

9 SKYLIGHTS LLC; THE FALLS AT
10 RHODES RANCH CONDOMINIUM
11 OWNERS ASSOCIATION, INC.,

12 Counter-defendants.

13 Fannie Mae and FHFA respectfully request that the Court set the pending, fully briefed
14 dispositive motion in this action, as well as the fully briefed dispositive motions in *Williston*
15 *Investment Group v. Freddie Mac*, No. 2:14-CV-02038-GMN-PAL, and *Elmer v. Freddie Mac*,
16 No. 2:14-cv-01999-GMN-NJK, for argument on June 18, 2015, the date currently scheduled for
17 the hearing on the pending summary judgment motion in a related action, *Saticoy Bay, LLC*
18 *Series 1702 Empire Mine v. Fannie Mae*, No. 2:14-cv-1975-GMN-NJK. See Minute Order,
19 *Saticoy Bay* (Dkt. 76) (granting expedited hearing); Minute Order, *Saticoy Bay* (Dkt. 83) (setting
20 June 18 as date for hearing). These cases all involve a common and potentially dispositive issue
21 of federal law—whether a federal statute mandating that “[n]o property of [an FHFA
22 conservatorship] shall be subject to ... foreclosure[] or sale without [FHFA’s] consent” preserves
23 Fannie Mae’s and Freddie Mac’s property interests when a homeowners’ association forecloses a
24 super-priority lien in a way that, under state law, might otherwise extinguish mortgage interests.
25 See 12 U.S.C. § 4617(j)(3). As we explained in seeking expedited argument in *Saticoy Bay*,
26 dozens of cases presenting that issue already are pending in this District, and more are expected.
27 See Joint Motion to Expedite Hearing, *Saticoy Bay* (Dkt. 72). Prompt resolution of this
28 potentially dispositive common issue therefore will serve the interests of efficiency and judicial
economy.

1 We propose that oral argument in *Elmer*, *Williston*, and *Skylights* be combined with
 2 argument in *Saticoy Bay* for two principal reasons. First, in addition to the common issue
 3 discussed above, *Elmer*, *Williston*, and *Skylights* all involve a newly minted “constitutional”
 4 defense to summary judgment not presented in *Saticoy Bay*—whether applying Section
 5 4617(j)(3) to preserve the Enterprises’ property interests would violate the due process rights of
 6 parties to the HOA foreclosure sale.¹ Resolution of that issue, now being advanced in an ever-
 7 growing number of cases in an attempt to anticipate and avoid the dispositive consequences
 8 should this Court rule that 12 U.S.C. § 4617(j)(3) prevents the extinguishment of Fannie Mae’s
 9 and Freddie Mac’s property interests, will facilitate the expeditious resolution of these litigations.
 10 Indeed, this due process argument has been raised in five of the ten similar cases pending in the
 11 District in which opposing parties already have filed briefs supporting or opposing dispositive
 12 motions.² Resolving the due process issue contemporaneously with the federal supremacy issue
 13 would eliminate the need for piecemeal litigation and would provide more useful guidance to
 14 other courts hearing similar cases, thereby serving the interests of efficiency and judicial
 15 economy.

16 Second, the *Saticoy Bay* plaintiff is attempting to prevent this Court from resolving the
 17 Section 4617(j)(3) issue promptly by seeking to moot its case unilaterally. Specifically, *Saticoy*
 18 Bay’s counsel reports that his “client has made the decision to pay off the outstanding trust deed
 19 in order to make the issues in [its] case moot.” E-mail from Bohn to Varma (May 5, 2015) (copy
 20 attached as Ex. A). *Saticoy Bay*, which is a plaintiff in several pending state court cases—and a
 21 few less advanced cases in federal court—raising the same legal issue, may hope to put off the
 22
 23

24 ¹ See *Elmer*’s Response to Motion for Summary Judgment at 9-15, *Elmer* (March 23,
 25 2015) (Dkt. 71) (arguing a violation of a purchaser’s due process rights); *Williston*’s Response to
 26 Motion for Summary Judgment at 13-18, *Williston* (April 3, 2015) (Dkt. 54) (same); The Falls at
 Rhodes Ranch Owners Association’s Response to Motion for Summary Judgment at 14-17,
Skylights (April 16, 2015) (Dkt. 31) (arguing a violation of a homeowner association’s due
 process rights).

27 ² In addition to *Elmer*, *Williston*, and *Skylights*, these include *Fannie Mae v. SFR*
 28 *Investments Pool 1, LLC*, No. 2:14-cv-2046-JAD-PAL (D. Nev.), and *Nationstar Mortgage, LLC*
v. SFR Investments Pool 1, LLC, No. 2:15-cv-0267-RFB-NJK (D. Nev.).

1 day this *federal* court resolves the controlling *federal-law* question.³ But whatever the
 2 motivation, Saticoy Bay's effort to moot the case comes to naught, as a party's "voluntary
 3 cessation of a challenged practice does not deprive a federal court of its power to determine the
 4 legality of the practice. If it did, the courts would be compelled to leave the [party] free to return
 5 to his old ways." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167,
 6 189 (2000) (quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 & n.10 (1982))
 7 (internal quotation marks, brackets, ellipses, and citation omitted). That said, hearing argument
 8 contemporaneously in cases that squarely present the substantive issues without the distraction of
 9 a mootness determination—such as *Elmer*, *Williston*, and *Skylights*—would likely result in a
 10 more thorough airing of the issues the Court anticipated addressing when it expedited the *Saticoy*
 11 *Bay* argument in the first place, thereby facilitating proper and complete resolution on the merits.

12 Setting argument for June 18 in *Elmer*, *Williston*, and *Skylights* will not unreasonably
 13 burden the parties or the Court. That date is more than a month away, leaving each party ample
 14 time to prepare to argue issues that are already fully briefed in each case. It will surely conserve
 15 judicial resources to hear argument on the Section 4617(j)(3) issue in one combined session
 16 rather than in multiple, case-specific sessions on separate dates.⁴ Moreover, because *Elmer*,
 17 *Williston*, and *Skylights* involve an issue not presented in *Saticoy Bay*, hearing the cases
 18 contemporaneously will be more efficient than convening a second argument to resolve
 19 separately the due process defense.

20 Counsel for FHFA contacted counsel for all opposing parties—*Skylights*, the HOA in
 21 *Skylights*, *Elmer*, and *Williston*—to seek their positions as to this motion and their availability
 22 June 18. Counsel for *Skylights* responded telephonically that he does not object and is available
 23 June 18. Counsel for the HOA in *Skylights* responded via e-mail that he is available June 18 and
 24 does not object generally to expediting argument, albeit with two narrow concerns relating to the

25
 26 ³ Indeed, Saticoy Bay sent its payoff request only five days after another court in this
 27 District ruled against it on a similar issue of federal preemption involving an HOA Sale. *See*
 28 Order, *Saticoy Bay LLC, Series 7342 Tanglewood Park v. SRMOF II 2012-1 Trust*, No. 2:13-cv-
 1199-JCM-VCF (Apr. 30, 2015) (Dkt. 53).

⁴ This is even more true here because *Elmer* and *Williston* are represented by the same
 28 counsel.

1 possibility that further briefing may be submitted. *See* E-mail from Dunkley to Johnson (May
 2 11, 2015) (attached as Ex. B).⁵ Counsel for Elmer and Williston interposed no objection to
 3 combining the hearings, but objected to scheduling a hearing on June 18 and every other date in
 4 the month of June, stating:

5 I have a weeklong binding arbitration (AAA) starting on June 22nd
 6 that is going to take up most of availability in June. Moreover, the
 7 beginning of June is filled with a number of outstate depositions. I
 8 would be opposed to having any argument on these matters in
 9 June. My first availability would be sometime after the July 4th
 10 weekend.

11 E-mail from Ayon to Johnson (May 11, 2015) (attached as Ex. C). Counsel for FHFA, Fannie
 12 Mae, and Freddie Mac believe that presenting argument in all four cases on June 18 would best
 13 facilitate the prompt and efficient resolution of the important issues pending in these cases. As
 14 no actual conflict with June 18 has been stated, FHFA, Fannie Mae, and Freddie Mac
 15 respectfully ask the Court to maintain that as the date of argument in *Saticoy Bay*, and to set
 16 argument in *Elmer*, *Williston*, and *Skylights* for that date as well.

17 * * *

18 Prompt resolution of the fully briefed dispositive motions in *Elmer*, *Williston*, and
 19 *Skylights* will benefit the parties, the Court, other courts in this District, and the public at large by
 20 providing guidance on important issues that may affect hundreds of Nevada properties.
 21 Combining argument in *Elmer*, *Williston*, and *Skylights* with the already-scheduled argument in
 22 *Saticoy Bay* will enable the Court to resolve all of the principal issues presented in dozens of
 23 pending cases, with no unreasonable burden to any party or the Court. Doing so would surely
 24 aid in “secur[ing] the just, speedy, and inexpensive determination” of this and many other
 25 actions, which is one of this Court’s prime directives. *See* Fed. R. Civ. Pro. 1. Accordingly,
 26 Fannie Mae and FHFA respectfully urge the Court to set argument on the pending dispositive

27 //

28 //

29 ⁵ We have no reason to believe counsel’s concerns cannot be resolved well before June
 30 18. We doubt that any further briefing will be required, but regardless there is ample time for
 31 any additional briefs to be submitted substantially in advance of June 18.

1 motions in *Elmer*, *Williston*, and *Skylights* for June 18, 2015, to be heard contemporaneously
2 with argument in *Saticoy Bay*.

3 DATED this 11th day of May, 2015.
4

5 **PITE DUNCAN, LLP**

6 By: /s/ Laurel I. Handley

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15 Association; CitiMortgage, Inc., and Clear
16 Recon Corp.*

17 **FENNEMORE CRAIG, P.C.**

18 By: /s/ Leslie Bryan Hart

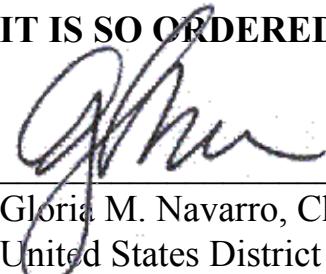
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25 and

26 **ARNOLD & PORTER LLP**
27 (Admitted *Pro Hac Vice*)
28 Asim Varma, Esq.
Michael A.F. Johnson, Esq.

29 *Attorneys for Intervenor Federal Housing
30 Financing Agency*

31 **IT IS SO ORDERED.**

32 
33 Gloria M. Navarro, Chief Judge
34 United States District Court

35 **DATED: 05/27/2015**

CERTIFICATE OF SERVICE

Pursuant to F.R.C.P. 5(b) and Electronic Filing Procedure IV(B), I certify that on the 11th day of May, 2015, a true and correct copy of **FANNIE MAE AND FHFA'S MOTION TO COMBINE HEARING ON THEIR MOTION FOR SUMMARY JUDGMENT WITH THE CURRENTLY SCHEDULED HEARING IN SATICOY BAY**, was transmitted electronically through the Court's e-filing electronic notice system to the attorney(s) associated with this case. If electronic notice is not indicated through the court's e-filing system, then a true and correct paper copy of the foregoing document was delivered via U.S. Mail.

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Michael N. Beede mike@legallyv.com

Peter E Dunkley pdunkley@nvbusinesslawyers.com

/s/ Pamela Carmon
Pamela Carmon

Exhibit A

Exhibit A

From: Michael F. Bohn [<mailto:mbohn@bohnlawfirm.com>]
Sent: Tuesday, May 05, 2015 03:50 PM Eastern Standard Time
To: Varma, Asim
Subject: Saticoy Bay Empire Mine v. FNMA 14-cv-01975

Counsel

My client has made the decision to pay off the outstanding trust deed in order to make the issues in the above case moot. However, his attempts to get a payoff statement have been thwarted.

Please consult with your client and get a payoff amount and payoff instructions so I may provide the same to my client

Thank you

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Exhibit B

Exhibit B

From: Peter Dunkley <PDunkley@lipsonneilson.com>
Sent: Monday, May 11, 2015 2:43 PM
To: Johnson, Michael A.F.; Kaleb Anderson
Cc: Mogul, Elliott
Subject: RE: Skylights: Motion to Expedite Argument

Michael,

I have two concerns with expedited oral argument.

First, I have not reviewed the reply in support of the pending motion for summary judgment. In the event that the reply raises new arguments, I would like to opportunity to request a sur-reply or other appropriate motion.

Second, the court has not addressed the objection to the stipulation to dismiss Citimortgage. In the event there is additional briefing required on that issue, I would like time to do so.

I am available on June 18, 2015, so as long as we address these two concerns, I do not have an objection. Let me know if you need to discuss my concerns.

Regards,



Peter E. Dunkley, Esq.

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From: Johnson, Michael A.F. [mailto:Michael.Johnson@APORTER.COM]

Sent: Monday, May 11, 2015 12:47 PM

To: Peter Dunkley; Kaleb Anderson

Cc: Mogul, Elliott

Subject: Skylights: Motion to Expedite Argument

Peter and Kaleb,

I represent the Federal Housing Finance Agency in *Skylights LLC v. Fannie Mae*, No. 2:15-cv-0043-GMN-VCF, in which you represent the HOA, and several other similar cases pending in Nevada.

FHFA, Fannie Mae, and Freddie Mac will be moving to expedite oral argument on the dispositive motions pending in *Skylights; Elmer v. Freddie Mac*, No. 2:14-cv-1999-GMN-NJK; and *Williston Investment Group v. Freddie Mac*, No. 2:14-CV-02038-GMN-PAL. We will propose that argument in those cases be conducted June 18, 2015, in conjunction with a hearing on a motion for summary judgment *Saticoy Bay, LLC Series 1702 Empire Mine v. Fannie Mae*, No. 2:14-cv-01975.

I write to request your position on expediting the *Skylights* hearing as described above. We intend to file the motion today, and would appreciate a prompt response stating your position and your availability to convene June 18. Please feel free to reply by e-mail or to call me if there are matters you would like to discuss. Thanks and regards.

-Michael Johnson
Counsel for FHFA

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Exhibit C

Exhibit C

From: Luis Ayon <laa@mgalaw.com>
Date: May 11, 2015 at 12:05:57 PM EDT
To: "Johnson, Michael A.F." <Michael.Johnson@APORTER.COM>
Subject: RE: Skylights, Elmer, Williston: Motion to Expedite Oral Argument

Michael:

I have a weeklong binding arbitration (AAA) starting on June 22nd that is going to take up most of availability in June. Moreover, the beginning of June is filled with a number of outstate depositions. I would be opposed to having any argument on these matters in June. My first availability would be sometime after the July 4th weekend.

Regards,

Luis Ayon

Luis A. Ayon
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From: Johnson, Michael A.F. [mailto:Michael.Johnson@APORTER.COM]
Sent: Monday, May 11, 2015 8:22 AM
To: mike@legallyv.com; Luis Ayon; Margaret Schmidt
Subject: Skylights, Elmer, Williston: Motion to Expedite Oral Argument

Counsel,

I write to follow up on voice-mails I left Mike and Luis earlier this morning. FHFA, Fannie Mae, and Freddie Mac will be moving to expedite oral argument on the dispositive motions pending in *Elmer v. Freddie Mac*, No. 2:14-cv-1999-GMN-NJK; *Williston Investment Group v. Freddie Mac*, No. 2:14-CV-

02038-GMN-PAL; *Skylights LLC v. Fannie Mae*, No. 2:15-cv-0043-GMN-VCF, cases in which one of you represents the plaintiff. We will propose that argument be conducted June 18, 2015, in conjunction with a hearing on a motion for summary judgment *Saticoy Bay, LLC Series 1702 Empire Mine v. Fannie Mae*, No. 2:14-cv-01975.

We intend to file today, and would appreciate a prompt response stating your position and your availability to convene June 18. Please feel free to reply by e-mail or to call me if there are matters you would like to discuss. Thanks and regards.

-Michael Johnson
Counsel for FHFA

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